

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT



Application No. 13883, of The National Black Child Development Institute, Inc., pursuant to Paragraph 8207.11 of the Zoning Regulations, for a variance from the use provisions (Sub-section 3105.3) to use all floors and basement of the subject premises as offices for a non-profit corporation in an R-5-D District at the premises 1463 Rhode Island Avenue, N.W., (Square 210, Lot 120).

HEARING DATE: December 15, 1982

DECISION DATE: March 2, 1983

FINDINGS OF FACT:

1. The subject site is located on the north side of Rhode Island Avenue between 14th and 15th Streets, N.W. and is known as premises 1463 Rhode Island Avenue, N.W. It is in an R-5-D District.

2. The subject site is a fairly level lot in the shape of a trapezoid containing an area of approximately 1,850 square feet. It is improved with a three story and basement brick structure. The applicant in this case is the National Black Child Development Institute, Inc., hereinafter referred to as NBCDI. Prior to acquisition by NBCDI, the subject premises was owned by a Mrs. Ruth Powell Strine. According to NBCDI, Mrs. Strine rented the structure to a group of doctors for professional office use. There is no certificate of occupancy on record to verify this professional office use.

3. The 1400 block of Rhode Island Avenue, N.W. is one block northeast of Scott Circle and one block southwest of Logan Circle. The block is characterized by mixed residential use housed in structures of varying height and bulk, including apartments, hotels, rooming houses, and at least one single family row dwelling. Four adjacent structures on the north side of the block, 1441 - 1449 Rhode Island Avenue, N.W., house artists and studio space. Immediately to the east of the subject structure, located at 1461 Rhode Island Avenue, N.W., is the headquarters of the National Society of the United States Daughters of 1812. A certificate of occupancy exists for this use, issued July 25, 1961. The applicant contended that there is an office use at 1439 Rhode Island Avenue. However, there is no record of a valid certificate of occupancy being granted to the occupants, Reap Associates, and there is thus no lawful

office use. East of the subject structure, at the far end of the block near the intersection of Rhode Island Avenue, N.W. and 14th Street, N.W., are several small commercial establishments. These establishments are part of the 14th Street commercial area.

4. The zoning district designations of the surrounding area include a C-M-3 District approximately 160 feet north-northwest of the site, a C-2-A District approximately 420 feet east of the site, an SP-2 District approximately 240 feet south-southeast of the site, an SP-1 District approximately 160 feet west-southwest of the site, and an R-5-B District approximately 110 feet west of the site. This variety of zoning districts results in a variety of uses including large apartment complexes and other smaller scale residential uses, hotels, non-profit offices, association offices and small commercial establishments.

5. The goal of the NBCDI is to improve the quality of life for Black children, their families and their communities. Through national state and local advocacy research and publications, education, training and direct services, NBCDI promotes the development and welfare of Black children. The NBCDI includes a national headquarters in Washington, D.C. and twenty-six volunteer-organized affiliates across the United States. In the subject facility, twelve persons are employed.

6. The NBCDI is a non-profit corporation organized in 1970 under the laws of California and authorized in 1973 to operate in the District of Columbia under a Certificate of Authority granted by the Office of Recorder of Deeds. On November 30, 1970, the Internal Revenue Service determined NBCDI to be tax-exempt under Section 501(c)(3) of the Internal Revenue Code and on August 24, 1973, the IRS determined that NBCDI was not a private foundation within the meaning of Section 509(a) of the Code.

7. When NBCDI was negotiating for purchase of the subject property in early 1976, the NBCDI was advised by the former owner's attorney that the property was in an R-5-D District in which offices of a non-profit organization were not permitted. Accordingly, a condition precedent was written into the contract for sale of the property requiring the then owner's attorney to secure a use variance from the BZA.

8. Thereafter, as a result of discussions with NBCDI's staff members and personnel in the office of the Zoning Administrator, the Zoning Administrator determined that NBCDI came within the definition of a "social service center" in Section 1202 of the Zoning Regulations, as a "community ... assistance ... center for persons in need of such assistance ...," with facilities that include meeting

rooms, and counseling and office space related to the program. The Zoning Administrator also concluded that NBCDI could operate in the R-5-D District as a social service center either as a matter-of-right under Paragraph 3104.312 of the Zoning Regulations then in effect if NBCDI had contracts with either District or Federal agencies or by way of special exception under Paragraph 3104.47 if it did not have such contracts. Although the applicant was prepared to file an application for a special exception, counsel for the former owner advised that, since NBCDI constantly received grants from both the District and Federal governments, it could obtain a certificate of occupancy immediately as of right without the need of a hearing. The NBCDI then presumably waived the condition requiring the application for a variance in the contract for sale and went to closing, purchasing the property for \$125,000. The property was purchased in 1976. The NBCDI has occupied the building since its purchase and presently occupies all floors of the building.

9. On March 3, 1976, the NBCDI filed an application for a certificate of occupancy to use all of the subject premises as a social service center pursuant to Section 1202 and Paragraph 3104.312 of the Zoning Regulations. A certificate of occupancy, No. B-97716, dated April 13, 1976, was issued to NBCDI to use all floors and basement of the subject premises as a "social service center grant #90 C 705 certificated of occupancy to expire june 29th 1976."

10. A building permit was issued on February 9, 1977, to the applicant authorizing work on the subject premises to permit "revisions to assure occupancy permit."

11. A certificate of occupancy, No. B-99725, was issued on April 4, 1978, to the applicant to use the subject premises as a "Social service center Grant No. 90-C 705 to expire 7-31-77."

12. By letter of November 20, 1978, the NBCDI was advised by the Zoning Inspection Branch that the facility was being operated as a social service center without a valid certificate of occupancy which was in violation of the D.C. Zoning Regulations.

13. On November 29, 1978, the NBCDI filed an application for a certificate of occupancy to use the facility as a social service center.

14. On December 14, 1978, the Zoning Commission by Emergency Order No. 255, amended the Zoning Regulations pertaining to halfway houses and social service centers. The Emergency Order was effective on that date for a period of not more than 120 days.

15. The Emergency Order deleted the existing Paragraph 3104.312 regarding halfway houses and social service centers as a matter-of-right in R-4 and R-5. The paragraph was replaced with a provision allowing a halfway house or social service center as a matter-of-right provided that there were no more than eight persons in residence not including supervisors, caretakers or similar attendants, and further provided that there was no other halfway house or social service center within 600 feet of the proposed location.

16. The said Order also deleted existing Paragraph 3104.47 regarding halfway houses as special exceptions in R-4 and R-5 Districts. That paragraph was replaced with a provision allowing a halfway house or social service center for up to thirty persons with BZA approval if there was no other halfway house or social service center within 600 feet of the proposed location and if the proposed use would not have an adverse effect on neighboring properties because of noise, traffic or other objectionable conditions.

17. The Emergency Order did not alter the definition of halfway houses or social service centers nor did it prohibit them from locating in R-4 or R-5 Districts. The major thrust of the emergency regulations noted above was to limit the number of residents permitted in such facilities and to regulate their spacing. The emergency regulations did delete the wording pertaining to operation by an agency of the District or Federal Government or operation under contract to such agency and supervised by that agency.

18. During the period while the emergency regulation was in effect, the Deputy Zoning Administrator informed NBCDI's counsel that the property could not qualify as a "social service center," and that, therefore, NBCDI should file with the BZA an application for a use variance to permit the subject premises to be used as offices of a non-profit organization.

19. On April 12, 1979, before Order 255 expired, the Zoning Commission issued a second Emergency Order, No. 275, which remained in effect until August 12, 1979. On August 12, 1979, the Zoning Regulations in effect prior to the issuance of the first Emergency Order became effective again.

20. On August 24, 1979, NBCDI filed another application, under Paragraph 3104.312, for a certificate of occupancy to use the subject premises as a social service center. By letter of November 16, 1979, the Zoning Inspection Branch informed NBCDI that its fourth application for a certificate of occupancy for a social service center had been denied. Upon review of a contract executed between NBCDI and Welfare Research Incorporated, said contract submitted by NBCDI in support of its classification as a

social service center, the Zoning Inspection Branch concluded NBCDI did not qualify for a certificate of occupancy under Paragraph 3104.312. According to a letter accompanying NBCDI's August 24, 1979, application for a certificate of occupancy, the basis for NBCDI's classification as a social service agency was a sub-grant from Social Service Research Institute. Social Service Research Institute held the main grant from the Department of Health, Education and Welfare.

21. On January 2, 1980, NBCDI's counsel requested additional information from the Zoning Inspection Branch detailing the legal and factual reasons for the November 16, 1979, rejection of NBCDI's application for a Certificate of Occupancy. Said opinion was requested in order to assess the grounds for appeal to the BZA of the Zoning Inspection Branch's decision. Counsel received no reply to his request.

22. Zoning Commission Order No. 347, containing amendments pertaining to community based residential facilities (CBRF) adopted by the Zoning Commission, became effective on August 7, 1981. The definition of a social service center was deleted. The regulations were amended to permit only Community Based Residential Facilities in residential districts. Under the current regulations, those social service centers which are not residential facilities are permitted only in accordance with the other provisions of the Zoning Regulations.

23. On October 30, 1981, NBCDI applied for a certificate of occupancy to use the subject premises as offices for a non-profit organization. By letter of December 14, 1981, the application for the certificate of occupancy was denied on the grounds that the R-5-D District did not permit such a use. The NBCDI was advised to file with the BZA an application for a use variance. On September 24, 1982, NBCDI filed the subject application.

24. The applicant argued that the "extraordinary or exceptional situation or condition," which now authorizes the Board to grant the use variance, was created first in December, 1978, by emergency amendment, and then in July, 1981, by permanent amendment, to the original, relevant Zoning Regulations. The amendments prevented NBCDI from continuing to occupy its property as a "social service center" in an R-5-D District either as of right under Paragraph 3104.312 of the Zoning Regulations or by way of special exception under Paragraph 3104.47 of those Regulations. Because NBCDI did not possess a valid certificate of occupancy when the amendments took effect, it could not operate the premises as a social service center as a non-conforming use.

25. Since 1976, NBCDI has invested a considerable amount of its assets and resources in the subject property so that it would be able to serve as a viable facility to implement NBCDI's functions and purposes. The applicant argued that the strict application of the R-5-D Zoning Regulations to NBCDI would result in "exceptional practical difficulties" and "undue hardship." At the present time, NBCDI pays \$11,400 annually on its obligations under its first trust on the property at 1463 Rhode Island Avenue, N.W. If NBCDI were not permitted to retain its present facility, it would have to acquire new space at a considerably higher cost. The NBCDI now occupies 3,000 square feet of office space and would require the same footage in another building. The annual cost of renting 3,000 square feet would range from a minimum of \$18.00 per square feet at \$54,000 to \$24.00 per square feet at \$72,000, compared to its current annual payment of \$11,400 on its first trust.

26. The applicant argued that failure to grant the variance would cause a hardship to those whom NBCDI serves. The NBCDI works to improve the quality of life for Black children. Since 1970, NBCDI has worked on behalf of Black children through direct service provision, advocates, and research. A national organization, NBCDI has thirty local affiliates, including one in Washington, D.C. The Institute's work, on both national and local levels, is particularly important in Washington, D.C., where eighty-seven percent of all children are Black. From its earliest years, NBCDI has been particularly concerned with helping Black parents and communities ensure that their children receive appropriate child care, with efforts to improve adoption possibilities for Black children and with foster care and other social service issues. More recently, NBCDI has begun to work in the areas of health, education, and youth unemployment. Throughout the years, NBCDI has emphasized the importance of giving Black parents and communities the resources and authority necessary to do what they know is best for their children. Without a variance, NBCDI will be unable to use its present property to continue carrying out its many activities and will have to devote valuable time, energy and assets to establish another facility to serve local and national needs.

27. The applicant argued that the relief requested would not create substantial detriment to the public good or substantially impair the intent, purpose and integrity of the zone plan. The NBCDI's use of the subject property, has not changed in any way since it began occupying the premises in early 1976. It continues to be a community assistance center with facilities, including meeting rooms, counseling and office space related to its program. The NBCDI's use is one that greatly benefits the community by rendering vital services to Black children. It does not provide on-site assistance by way of temporary shelter, meals, etc.

28. The NBCDI's use of its property has never brought any complaint from any of NBCDI's neighbors. The use is not incompatible with the adjoining residential uses existing in the area. It is the same use permitted under Paragraph 4101.44 of the Zoning Regulations in the sizable SP District that is less than a block away from the R-5-D District in which the subject property is located and that borders the R-5-D District on both the south and west sides.

29. The Office of Planning and Development, by report dated December 7, 1982, recommended that the application be denied. The OPD noted that as early as November, 1978, NBCDI's attorney was advised by the Zoning Administrator's office that NBCDI's premises did not qualify as a social service center. Rather than appeal this decision of an administrative officer to the BZA pursuant to Sections 8102 and 8206 of the Zoning Regulations, NBCDI continued to apply for an occupancy permit to use the subject premises as a social service center. The NBCDI's fourth and final application, in August of 1979, to use the subject premises as a social service center was rejected because, at the time of the application, NBCDI was operating under a sub-grant rather than a direct grant from the Federal Government. Again, NBCDI's attorney did not appeal this administrative decision.

30 As to the standards under which a use variance can be granted the OPD reported that there was no condition inherent in the site which rendered use of the property in accordance with R-5 requirements impossible. The site is a fairly level, trapezoid shaped lot of approximately 1,800 square feet. The OPD was of the opinion that the information submitted by the applicant's attorney failed to address the standards for a use variance established by the Palmer Case, i.e., that "reasonable use cannot be made of the property in a manner consistent with the Zoning Regulations" Palmer v. Board of Zoning Adjustment, 287 A. 2d 535, 542, (D.C. App., 1972.) As put forth in the application, NBCDI's sole justification for a use variance was the financial hardship that would accrue to the organization if it was required to rent comparable office space in an appropriate zone. While the OPD sympathized with the organization, especially in light of the protracted administrative process NBCDI went through in an effort to gain permanent recognition as a social service center, the OPD did not believe that economic hardship justified the granting of a use variance. While the Board concurs in the OPD's interpretation of Palmer, it does not concur with the OPD's ultimate recommendation. The Board also notes that the applicant acted less than diligently in not pursuing other available remedies. The Board does not look favorably upon an applicant who continued to operate its facility some five years without a valid certificate of occupancy.

31. The Chairman of Advisory Neighborhood Commission 2C, by letter of September 23, 1982, advised the BZA that the ANC supported the application. The letter stated that for the past six years, NBCDI has occupied its present location on Rhode Island Avenue from which it has conducted its many excellent activities. The NBCDI has been a good neighbor and community participant. Its activities have never brought complaints from any of its neighbors. The letter stated that the previous use of the NBCDI property as a community assistance center has been and continues to be entirely appropriate to, and in complete harmony with, the existing use of immediate neighborhood properties. Moreover, NBCDI's property use has never, nor can ever, create dangerous or objectionable traffic conditions in view of the public transportation and public parking facilities in the area. Having twice qualified for a certificate of occupancy before amendments to Zoning Regulations prevented it from continuing to occupy its property as a social service center in an R-5-D District, the letter concluded that NBCDI should not now be prevented from continuing its activities in its present location.

32. The Board is required by statute to give great weight to the issues and concerns of the ANC that are reduced to writing. At the public hearing the Board questioned whether the letter of September 23, 1982, constituted a letter from the ANC or whether it was a letter signed by the Chairman and reflecting his views alone. The letter did not indicate whether an ANC meeting had in fact been held. No vote was listed in the letter. The record was left open for the ANC to comment. No comment was received. Even assuming the letter constituted an ANC recommendation, the Board, in addressing these concerns, finds that the ANC has not addressed the issue of a use variance. There is no doubt in the Board's mind that the work of the applicant is very meritorious and that the applicant is a good neighbor. The issue before the Board however, is how the applicant meets the standards for a use variance. The ANC did not address those standards. There are therefore no relevant issues and concerns to address.

33. The applicant, in its post-hearing legal memorandum contended that the standards for a use variance established in Palmer have been modified by the Court of Appeals and that the applicant's current use meets those standards. The applicant argued that aside from its rigid reliance on what is presumably considered to be the plain words of Palmer the OPD admitted that it had little familiarity with any of the cases decided by the District of Columbia Court of Appeals since Palmer, in which the Court interpreted and analyzed the Palmer ruling and upheld use variances in other circumstances comparable to the present case. Monaco v. BZA 407 A.2d 1091 (D.C. App., 1979); De Azcarate v. BZA, 388 A.2d 1233 (D.C. App., 1978). See also Clerics of Saint Viator, Inc. v. BZA, 320 A.2d 291 (D.C. App., 1974). The Board

referred the applicant's legal memorandum to the office of the Corporation Counsel for an opinion. The opinion was received and is marked as Exhibit No. 40 of the record.

CONCLUSIONS OF LAW AND OPINION:

Based on the record and the findings of fact set forth herein, the Board concludes that the applicant is seeking a use variance, to permit the office of a non-profit organization in a zone where such offices are not normally permitted. The Board has normally applied a very strict test to use variance cases. As set forth in the Zoning Act and the Zoning Regulations, and as enunciated by the D.C. Court of Appeals in the Palmer case cited in the Findings of Fact, in order to be granted a use variance an applicant must show:

1. An exceptional or extraordinary situation or condition of the specific piece of property at issue.
2. An undue hardship upon the owner deriving from the strict application of the Regulations.
3. No detriment to the public good or impairment of the general intent and purpose of the Zoning Regulations.

These standards are very stringent, and the granting of use variances occurs only in the most unusual circumstances.

The applicant relies heavily in its arguments on decisions of the Court of Appeals which followed the Palmer case, specifically Monaco and De Azcarate, cited above. In Monaco, the Court upheld the granting of a use variance to the Republican National Committee by stating:

"...we consider that BZA may be more flexible when it assesses a non-profit organization which is a well established element of our governmental system".
Monaco, at 1098.

The Court recognized that public need is a crucial factor in determining a variance. The characterization of the use as a public service is extremely significant. The Court noted that a lesser burden could be placed on recognized public services such as hospitals and quasi-governmental entities. Public service users need not prove that conforming uses will not yield a reasonable return, that their particular difficulty is caused by unique circumstances or that the use will not materially alter the neighborhood. However, an applicant must properly document that it is a public service rather than simply an organization with special interests. Non-profit organizations are not automatically granted

variances on the basis of their non-profit status alone. The Board must determine that the desired use variance would serve a valuable public need.

In De Azcarate, the Court was asked to determine whether action by the zoning authorities provided implicit assurance that a project could be completed. The Court found that the applicant had relied in good faith on the zoning authorities actions, creating a unique situation which could only be corrected through the granting of a variance. To apply the De Azcarate precedent to the subject case the BZA must determine whether the past actions of the zoning authorities constituted explicit assurance that the property could be used as desired by NBCDI and whether NBCDI justifiably relied on such assurances in purchasing its building and making subsequent improvements.

In applying all of these standards to the subject case, the Board concludes that under the Palmer test, the applicant has failed to meet its burden. It has demonstrated no unique conditions of the property. The Board further concludes that the applicant has not met its burden of proof under the De Azcarate test. It is clear from the facts recited in Findings 9, 10 and 11 that the NBCDI never received an unqualified approval to occupy the building. All approvals were granted only for limited periods of time, including one occupancy permit that was dated to expire before it was issued. Further, the applicant was clearly not diligent in its obligations to obtain proper authorizations. The building has been used without a certificate of occupancy since 1977, more than five years. The applicant did not promptly pursue denials of occupancy permit applications, when filing appeals with this Board could have resolved the matter.

The Board must then address the standards set forth by the Court of Appeals in the Monaco case. The Board notes first that the test is discretionary: "BZA may be more flexible ..." (emphasis added). In the subject case, the applicant before the BZA is clearly a meritorious agency. The benefits for the District of Columbia and its residents are clear. Further, there is strong support for the applicant, no opposition to the variance and a lack of any suggestion that the use has created or will create any adverse effects in that area. The Board is further convinced that the applicant would suffer an undue hardship if it were forced to leave the subject premises and seek office space elsewhere. Accordingly, on balancing all the issues, the Board concludes that there is a sufficient basis to grant a use variance to this applicant and this applicant only.

The Board further concludes that the application can be granted without substantial detriment to the public good and


without substantially impairing the intent, purpose and integrity of the zone plan. Accordingly, it is ORDERED that the application is GRANTED SUBJECT to the following CONDITIONS:

1. The use of the subject premises shall be limited to the National Black Child Development Institute, Inc.
2. The number of employees shall not exceed a maximum of twelve.
3. At such time as the applicant may offer the property for sale, it shall be advertised and sold for use only for a purpose permitted in the zone district applicable to the property.

VOTE: 5-0 (Lindsley Williams, Carrie Thornhill, Douglas J. Patton, William F. McIntosh and Charles R. Norris to GRANT).

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

ATTESTED BY:


STEVEN E. SHER
Executive Director

FINAL DATE OF ORDER: OCT - 4 1983

UNDER SUB-SECTION 8204.3 OF THE ZONING REGULATIONS, "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE BEFORE THE BOARD OF ZONING ADJUSTMENT."

THIS ORDER OF THE BOARD IS VALID FOR A PERIOD OF SIX MONTHS AFTER THE EFFECTIVE DATE OF THIS ORDER, UNLESS WITHIN SUCH PERIOD AN APPLICATION FOR A BUILDING PERMIT OR CERTIFICATE OF OCCUPANCY IS FILED WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS.

13883order/LJP